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SUPREME COURT, U.S.

FILED

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 313

WALTER SELINGER,
Petitioner,

vs.

LESTER BIGLER, Special Agent of the Internal Revenue Service, et al.,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

DAVID R. FRAZER
Arizona Title Building
Phoenix, Arizona
Attorney for Petitioner

JOHN C. KING and
SHIMMEL, HILL, KLEINDIENST & BISHOP
Arizona Title Building
Phoenix, Arizona
Of Counsel

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

SUBJECT INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Constitutional Provision Involved	2
Statement of the Case	2
Reasons for Granting the Writ	4
Conclusion	9
Appendix	

TABLE OF AUTHORITIES CITED

Cases

	Pages
Escobedo v. Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed. 2d 977 (1964)	4, 5, 8
Kohatsu v. U. S., 351 F.2d 898 (9 Cir. 1965)	7
Mathis, Sr. v. U. S., 67-1 USTC par. 9408 (5 Cir. 1967)	8, 9
Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 694 (1966)	5, 6, 7, 8, 9
Moon v. Brennan, 19 AFTR 2d 641 (1966)	8
Morgan v. U. S., 67-1 USTC par. 9449 (1 Cir. 1967)	7
Rickey v. U. S., 360 F. 2d 33 (9 Cir. 1966)	7
Schlinsky v. U. S., 67-2 USTC par. 9493 (1 Cir. 1967)	7, 9
U. S. v. Carlson, 260 F. Supp. 423 (E.D.N.Y. 1966)	7
U. S. v. Fiore, 258 F. Supp. 435 (W.D.Pa. 1966)	7
U. S. v. Hill, 260 F. Supp. 139 (S.D.Cal. 1966)	7
U. S. v. Neves, 67-1 USTC par. 9412 (1967)	8
U. S. v. Rabin, 67-1 USTC par. 9465 (1967)	8
U. S. v. Schoenborg, 19 AFTR 2d 347, 351 (D.Ariz. 1966)	6
U. S. v. Spomar, 339 F. 2d 941 (7 Cir. 1965)	7
U. S. v. Turzynski, 67-2 USTC par. 9489 (N.D.Ill. 1967)	6

Articles

Burns, Searches & Seizures; The Suppression of Evidence, N.Y.U. 20th Institute on Federal Tax 1081, 1087 (1962)	5
James O. Hewitt, "6th Amendment Rights of the Taxpayer in a Fraud Investigation", Bulletin of the Section of Taxation, American Bar Association, January, 1966	6
Paul P. Lipton, "Constitutional Rights in Criminal Tax Investigations", 53 A.B.A.J. 517 (1967)	6
Weiss and Balter, "Special Agents Need Not Advise a Taxpayer of His Constitutional Rights," The Journal of Taxation (July 1966) at pages 26, 27	5

REGULATIONS

Pages

Regulation 1118.6, Statement of Organization and Functions of Intelligence Division, C.C.H. 1965, Standard Federal Reporter, Paragraph 5988 (March 24, 1965) 5

STATUTES

U.S.C.A. Const. Amend VI 2

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. .....

WALTER SELINGER,
vs.
Petitioner,

LESTER BIGLER, Special Agent of the Internal Revenue Service, et al.,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioner prays that a Writ of Certiorari issue to review a judgment of the United States Court of Appeals for the Ninth Circuit, entered on April 27, 1967.

OPINIONS BELOW

The opinion of the District Court is reported in 260 F. Supp. 476 (D. Ariz., 1966). The opinion of the Court of Appeals has not been reported.

JURISDICTION

The judgment of the Court of Appeals was made and entered on April 27, 1967. A petition for rehearing was filed within the time allowed, on May 24, 1967, and denied on May 31, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1), 62 Stat. 928.

QUESTION PRESENTED

If a taxpayer is not informed of his right to counsel before he is questioned by special agents of the Internal Revenue Service, whose only duty is to investigate criminal tax fraud, can any statements made by him or any records seized by the government be used against him?

CONSTITUTIONAL PROVISION INVOLVED

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense. (U.S.C.A. Const. Amend. VI).

STATEMENT OF THE CASE

Jurisdiction of the United District Court for the District of Arizona existed under Rule 41 (e), the Federal Rules of Criminal Procedure, 18 United States Code.

This action was brought by Walter Selinger in the form of a motion for the return of property and to suppress evidence under Rule 41 (e) of the Federal Rules of Criminal Procedure. Plaintiff's motion contended that a Special Agent of the Internal Revenue Service, and an Internal

Revenue Agent who accompanied the Special Agent, illegally photocopied Mr. Selinger's books, records and other memoranda in the course of a criminal income tax investigation of Mr. Selinger's business, a sole proprietorship. (R., Vol. I at 1).

These two representatives of the Treasury Department came to Mr. Selinger's place of business and asked to see him on the morning of October 20, 1965. Since Mr. Selinger was not in when the Agents arrived, Lester Bigler, a Special Agent in the Internal Revenue Service, called Mr. Selinger on the telephone. Mr. Bigler did not identify himself or tell Mr. Selinger why he wanted to see him, except that he did identify himself and Mr. Landesman as "Government Men". The Agents made an appointment with Mr. Selinger for 12:30 P.M. on the same day. When the Agents arrived, Mr. Selinger took them into his private office, where Mrs. Selinger was waiting. Mr. Bigler showed Mr. Selinger his credentials, which contained his photograph and indicated that he was a Special Agent with the United States Treasury Department. (R., Vol. I at 127-128). Special Agent Bigler did not inform Mr. Selinger of his function with the United States Treasury Department. (R., Vol. II at 9). Mr. Selinger had never had any prior dealings with Treasury Agents (R., Vol. II at 20), and he was not aware of the criminal functions of a Special Agent of the Internal Revenue Service. (R., Vol. I at 16).

Both Treasury Agents testified that they told Mr. Selinger who they were and what they wanted, and that Mr. Selinger agreed to let them see all of his business records. Both Mr. and Mrs. Selinger, as well as Selinger's bookkeeper, testified that permission to examine books and records was neither asked nor granted to the Treasury Agents. It is undisputed that neither Agent informed Mr.

Selinger of his right to counsel at any time during this interview. (Bigler deposition, page 10).

That same afternoon, both Agents went to the office of Sidney Markow, Mr. Selinger's accountant, and photocopied all of Mr. Selinger's records that were in the accountant's possession. On the following day, October 21, 1965, the Agents returned to Mr. Selinger's place of business and photocopied many of his remaining records. (R., Vol. I at 128). When Mr. Selinger subsequently learned that the Agents had returned and were copying his records, he contacted a business friend who requested a tax attorney, Harold W. Wales, to contact Mr. Selinger. After speaking briefly with Mr. Selinger, Mr. Wales then talked to Mr. Bigler and, as a result, Mr. Bigler agreed to leave the premises. (R., Vol. II at 17-19).

The District Court denied the motion for the return of property and to suppress evidence. The Order was affirmed by the Court of Appeals, and a petition for rehearing was denied.

REASONS FOR GRANTING THE WRIT

1. In *Escobedo v. Illinois,* 378 U.S. 478, 84 S.Ct. 1758, 12 L. Ed. 2d 977 (1964), the Supreme Court of the United States held that an individual has the right to the assistance of counsel under the 6th Amendment to the United States Constitution when a criminal investigation begins to focus on a particular suspect. In the instant case, the investigation focused on Mr. Selinger when Special Agent Bigler was assigned to investigate Mr. Selinger for possible violations of the criminal tax laws. When Mr. Bigler was so assigned, the investigation was "no longer a general inquiry into an unsolved crime" because Mr. Selinger, and only Mr. Selinger, was suspected of violating the criminal tax laws.

In *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed. 694 (1966), the Supreme Court held that "prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." (16 L.Ed. 2d 694 at 706-707).

The question to be decided is whether *Escobedo* and *Miranda* are equally applicable to criminal tax matters. The philosophy and rational of *Escobedo* and *Miranda* are that an individual should be apprised of his right to counsel whenever the investigation is no longer a general one but focuses upon a particular individual. In a typical non-tax criminal case, the investigation does not focus on the accused until after there has been a determination made that a crime has been committed and there has been a search for individuals suspected of committing the crime. In such cases, the right to counsel normally attaches when the suspect is first interrogated by the police.

In a criminal tax fraud case, the investigation focuses on a particular taxpayer immediately, but necessarily before there is complete evidence that a crime has been committed. When a Special Agent has been assigned to a case, there is, and remains, only one suspect. When the Special Agent discovers proof that a crime has been committed, this is also proof that the particular taxpayer is guilty of it.

Under the Treasury Regulations,[1] the textual material written on the subject,[2] and under the provisions of the

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1. Reg. 1118.6, Statement of Organization and Functions of Intelligence Division, CCH 1965 Standard Federal Reporter, Paragraph 5988 (March 24, 1965).

2. Weiss and Balter, "Special Agents Need Not Advise a Taxpayer of His Constitutional Rights," *The Journal of Taxation* (July 1966) at pages 26, 27.

Burns, *Searches and Seizures: The Suppression of Evidence*, N.Y.U. 20th Institute on Federal Tax 1081, 1087 (1962).

Internal Revenue Agent's Manual, it is clear that the sole function of a Special Agent of the Intelligence Division is to seek evidence of crimes. The manual itself provides:

> "That upon the entry of a Special Agent it becomes a new investigation of a 'criminal' nature and the civil tax liability is no longer involved. The Internal Revenue agent's manual specifically provides that the civil investigation is suspended."[3]

If the rationale of *Miranda* is to have any meaning at all in a tax fraud investigation, the taxpayer must be informed of his right to counsel whenever a Special Agent of the Internal Revenue Service enters the case. The critical time for the advice of an attorney is when a Special Agent interrogates a taxpayer and seeks permission to examine his books and records. This is the crucial point when the taxpayer most needs to be informed of the consequences of allowing a Special Agent to inspect and photocopy his records. After the books and records of the taxpayer have been examined by specially trained revenue agents, the evidence necessary to convict a taxpayer will normally have been obtained. Thus, to inform the taxpayer of his right to counsel at some later time would be a useless gesture.[4]

Any evidence obtained from a taxpayer should be admissible only if the taxpayer furnished it after knowingly and voluntarily waiving his constitutional rights and privileges. As pointed out recently in a comprehensive opinion on the subject, the District Court in *U.S. v. Turzynski*, 67-2 USTC par. 9489 (N.D.Ill. 1967), stated:

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3. *U. S. v. Schoenborg*, 19 AFTR 2d 347, 351 (D.Ariz. 1966).

4. See, generally, James O. Hewitt, "6th Amendment Rights of the Taxpayer in a Fraud Investigation", Bulletin of the Section of Taxation, American Bar Association, January, 1966; Paul P. Lipton, "Constitutional Rights in Criminal Tax Investigations", 53 A.B.A.J. 517 (1967).

"To hold otherwise would lead to the anomalous conclusion that a person suspected of bank robbery, sale of narcotics, murder, rape or other serious crime is entitled to greater protection of his constitutional rights than a person suspected of violating the Internal Revenue laws. For when the final transition from civil to criminal investigation takes place in a tax case, the taxpayer being investigated and asked to furnish his books and records, is just as surely a prime suspect and candidate for criminal prosecution as the individual under interrogation as a suspect for other crimes.

"In the last analysis, the test enunciated by recent decisions is whether a suspect has voluntarily waived his constitutional rights and privileges. The Supreme Court has logically pointed out that it is impossible voluntarily to waive a right or privilege you are unaware you possess. *Miranda v. Arizona,* 384 U.S. 436, at 462."

This same Court went on to state that in some respects the tax investigation is more insidious and dishonest than a custodial investigation, because the suspect in custody knows his interrogators are seeking evidence to convict him of a crime while the tax suspect is permitted and even encouraged to believe that no criminal prosecution is in contemplation.

Since the Supreme Court's decision in *Miranda,* a substantial number of courts have considered the issue involved in this petition for certiorari.[5] These courts rely, in most

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5. *United States v. Spomar,* 339 F. 2d 941 (7 Cir. 1965);
Kohatsu v. United States, 351 F. 2d 898 (9 Cir. 1965);
Rickey v. United States, 360 F. 2d 33 (9 Cir. 1966);
United States v. Fiore, 258 F. Supp. 435 (W.D.Pa. 1966);
United States v. Carlson, 260 F. Supp. 423 (E.D.N.Y. 1966);
United States v. Hill, 260 F. Supp. 139 (S.D.Cal. 1966);
Schlinsky v. United States, 67-2 USTC par. 9493 (1 Cir. 1967);
Morgan v. United States, 67-1 USTC par. 9449 (1 Cir. 1967);

instances, on an interpretation of *Miranda* which concludes that the latter decision only applies to situations where a suspect is in the custody of the police or is deprived of his physical freedom in some significant way.

Petitioner submits that the *Miranda* decision did not limit the right to counsel to a person in custody since the court recognized that an individual could convict himself by waiving his constitutional rights before the "in custody" status had been reached. Moreover, as pointed out in the *Turzynski* case, the Supreme Court in *Miranda* set forth the broad principle that when the investigative power of the Government is directed toward an individual with the intent to obtain incriminating evidence from him, the individual should be afforded an opportunity knowledgeably to exercise his constitutional rights. It is actually because a person cannot knowledgeably exercise his rights unless he is aware of them that the multiple warning requirement was established.

The Petitioner's Writ of Certiorari should be granted because of the decision of the Ninth Circuit is in conflict with *Escobedo* and *Miranda*. An individual should be informed of his right to counsel when a criminal investigation reaches the accusatory stage. In a criminal tax fraud investigation, this stage is reached when a Special Agent first interrogates the taxpayer who is suspected of defrauding the Government.

2. The Petitioner's Writ of Certiorari should be granted because of the importance of the issue and principle

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Mathis, Sr. v. United States, 67-1 USTC par. 9408 (5 Cir. 1967);
Moon v. Brennan, 19 AFTR 2d 641 (1966);
United States v. Rabin, 67-1 USTC par. 9465 (1967);
United States v. Neves, 67-1 USTC par. 9412 (1967).

involved. Two other Circuit Courts of Appeal[6] have decided that *Miranda* is inapplicable to a criminal tax fraud case, and several additional Circuit Courts of Appeal will be deciding this issue within the immediate future. In light of the number of courts that have been asked to rule on this issue,[7] and in light of its importance, the Supreme Court should consider this case at this time to preclude further litigation and uncertainty.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

DAVID R. FRAZER
Attorney for Petitioner

JOHN C. KING and
SHIMMEL, HILL, KLEINDIENST
& BISHOP
Of Counsel

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6. *Schlinsky v. United States, Infra.*
Mathis, Sr. v. United States, Infra.

7. See cases collected in footnote 5.

(Appendix Follows)

Appendix

In the United States District Court
for the District of Arizona

No. Civil 5792—Phoenix

Walter Selinger,
Petitioner,

vs.

Lester Bigler, Special Agent of the Internal Revenue Service, and Robert Landesman, Internal Revenue Agent,
Defendants.

OPINION AND ORDER

This cause came before this Court by means of a pre-indictment pleading under Federal Rules of Criminal Procedure 41(e). Petitioner and movant, Walter Selinger, filed a Motion for Return of Property and to Suppress Evidence, alleging that the defendants—one a Special Agent of the Internal Revenue Service, and the other an Internal Revenue Agent, had illegally photocopied petitioner's books, records, and other memoranda in the course of an income tax investigation of petitioner's business, a sole proprietorship.

Specifically, the petitioner asked the Court for an Order directing that the photocopies made by the defendants be returned and that their use for any proceeding, whether civil, criminal, or administrative, be suppressed. At the same time, petitioner asked for a temporary restraining

order seeking to enjoin defendants from proceeding further with any investigation based on the records alleged to have been illegally photocopied.

A temporary Restraining Order was granted and an Order to Show Cause hearing was set to determine the disposition of petitioner's Motion to Suppress Evidence and For Return of Property. Thereafter, and before the hearing was held on petitioner's Motion, the United States Attorney, acting on behalf of the defendants, moved the Court for an Order dismissing the proceedings, alleging three grounds in support of this Motion:

1. The petitioner's Motion was anticipatory and premature in that no criminal proceeding existed by which Rule 41(e) of the Federal Rules of Criminal Procedure could be invoked.

2. The Court lacked jurisdiction over the subject matter.

3. Petitioner's Motion fails to state a cause of action on which relief could be granted.

The Court took the Government's Motion to Dismiss under advisement and proceeded with the hearing.

At the hearing, the testimony showed that, on the morning of October 20, 1965, the two Revenue Agents came to Mr. Selinger's place of business and asked to see him. Mr. Selinger was not in at that time; however, one of his employees contacted him by telephone and Mr. Selinger talked over the phone to one of the agents, Lester Bigler, Special Agent of the Internal Revenue Service. Other than identifying themselves as "government men", Mr. Bigler gave no further indication to Mr. Selinger as to their identity or their reason for wanting to see him. In any case, they arranged to meet at Mr. Selinger's place of business at 12:30 P.M. on that day. Mr. Selinger was in his place of business when the two agents arrived and he took them into his

private office, where Mr. Bigler showed Mr. Selinger his identification card, which contained his photograph and indicated that he was a Special Agent with the United States Treasury Department. Mrs. Renee Selinger, the petitioner's wife, was also present during the entire period and Rudy Boehmer, Mr. Selinger's Office Manager, for a brief period during the interview.

There is substantial disagreement as to what was said by each of the parties at this time. The defendants contend that, while they were talking to Mr. Selinger in his office, they told him who they were and what they wanted, and that he agreed to let them see all of his business records, which, for the most part, were in the possession of Mr. Selinger's accountant, Mr. Sidney Markow. Mr. Selinger denies that he ever gave permission to the agents to see his records.

The two agents went to the office of Mr. Selinger's accountant, Sidney Markow, that afternoon and photocopied all of Selinger's records that were in his possession. The next day, they returned to Mr. Selinger's place of business and photocopied many of the remaining records. It is all of these records, so photocopied, that petitioner claims were illegally obtained and whose use in evidence he seeks to suppress with a return to him of all records photocopied.

The oral testimony consisted of an initial two day hearing, held on December 13 and 14, 1965, and additional hearings which were held on January 7 and 14, 1966. In addition to this, depositions were taken of most of the principal witnesses prior to the hearings, which began in December.

After considering all of this testimony, together with the exhibits, the Court is of the opinion that defendants' Motion to Dismiss should be denied, and it is so ordered. Certainly, if the facts, as alleged by the petitioner, were true, namely,

that his records were photocopied without his permission, then there should be a remedy. There is respectable authority to support this view.

DiBella v. United States, 82 S.Ct. 654 (1962)

Rogers v. United States, 158 F.Supp. 670 (U.S.D.C. S.D. Cal. 1958)

Lord v. Kelley, 223 F.Supp. 684 (U.S.D.C. Mass. 1963)

Hinchcliff v. Clarke, 230 F.Supp. 91 (U.S.D.C. N.D. Ohio 1963)

As to the facts themselves, the Court finds: that the petitioner was initially advised by the defendants that one of them was a Special Agent for the Internal Revenue Service; that the other was an Internal Revenue Service Agent; that they wished to see his business records for the purpose of investigating his tax returns; that petitioner was advised by the defendants that he would not have to show them his records and that he would not have to give them any information if he did not so desire. Nevertheless, the Court finds that petitioner agreed that the defendants could examine his business records, which were subsequently photocopied by the defendants, and that petitioner did so voluntarily without any threats or promises of any kind being made to him by the defendants.

The Court further finds that, on the basis of the testimony of the petitioner's accountant, Mr. Markow, he, Mr. Markow, turned over Mr. Selinger's business records to the defendants of his own free will and not under the pressure of any threats or coercion or misrepresentations. It is true, and the Court accepts this testimony as a fact, that Mr. Bigler testified that he told Mr. Markow that Mr. Selinger had given them permission to see the records; but it is also

true that, while Mr. Markow denied that this was said to him, nevertheless, Mr. Markow agreed that he voluntarily let the defendants see the business records of Mr. Selinger, which the defendants photocopied.

The Court also finds that the business records photocopied by the defendants at Mr. Selinger's place of business during the morning of October 21, 1965 were also voluntarily made available to the defendants by the petitioner and that when Mr. Rudy Boehmer, the Office Manager for the petitioner, made these records available, he did so with the knowledge that Mr. Selinger had given him the authority to make these records available to the defendants and that in any case, he turned these records over to the defendants voluntarily and not under the pressure of any threats or coercion.

Since all of the records photocopied by the defendants were obtained with the consent of petitioner, the Court denies petitioner's Motion to Suppress this evidence and denies the request that this evidence so photocopied be returned to petitioner, and it is so ordered.

The Court concludes that this evidence was not illegally obtained and that none of the petitioner's constitutional rights have been violated.

One other issue was determined by the Court during the course of these hearings.

On January 7, 1966, hearing was held on petitioner's request for an Order to Show Cause why the defendants should not be punished for contempt of Court for alleged violations of the temporary Restraining Order previously issued by the Court. So that the record is clear, the Court specifically finds that the Restraining Order of the Court was not violated. The evidence adduced at this hearing, from the various witnesses who testified, shows that the only investigation carried out by the defendants, after the

date of the Restraining Order, was based on information not obtained from the business records of Mr. Selinger that were photocopied. The information, in fact, upon which the defendants conducted the investigation after the date of the temporary Restraining Order, was obtained from the income tax returns of petitioner and from a letter received by the Internal Revenue Office from a confidential informant.

The Court also specifically rules that the defendants are not enjoined from proceeding further with their investigation of petitioner or from using the information obtained from the petitioner's business records which they have photocopied.

Dated this 27th day of April, 1966 at Phoenix, Arizona.

United States District Judge

Copy to:

David R. Frazer
Shimmel, Hill, Kleindienst & Bishop
Attorneys for Petitioner
111 West Monroe Street
Phoenix, Arizona

William P. Copple
United States Attorney
Federal Building
Phoenix, Arizona

United States Court of Appeals
For the Ninth Circuit

No. 21,116

Walter Selinger,
Appellant,

vs.

Lester Bigler, Special Agent of the Internal Revenue Service, et al.,
Appellees.

[April 27, 1967]

On Appeal from the United States District Court for the District of Arizona

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Before: Jertberg and Merrill, Circuit Judges, and Taylor, District Judge

Per Curiam:

Selinger appeals from the denial of his motion to return copies of his records and suppress their use as evidence made pursuant to F.R.Cr.P. 41(e).[1] The copies were made by agents of the Internal Revenue Service in the course of an investigation under circumstances which, appellant asserts, amounted to an unlawful search and seizure. The District Court denied relief upon the ground that appellant had given consent to the examination of his records.

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1. See *Hoffritz v. United States*, 240 F.2d 109 (9th Cir. 1956); *Rodgers v. United States*, 158 F.Supp. 670 (S.D.Cal. 1958). This is an appealable final order under 18 U.S.C. § 1291 (1964) per *Goodman v. United States*, 369 F.2d 166 (9th Cir. 1966).

Appellant contends that his constitutional right to counsel was violated under *Escobedo v. Illinois,* 378 U.S. 478 (1964), in that the investigation had reached the accusatory stage (a Special Agent having participated in the investigation), and he was not advised of his rights. This court has ruled against appellant's contention in *Kohatsu v. United States,* 351 F.2d 898 (9th Cir. 1965), *cert. denied,* 384 U.S. 1011 (1966). Appellant seeks to distinguish that case. We find no basis for distinction and regard the decision as controlling here.

Appellant challenges the court's finding of a voluntary consent. In our judgment the finding was not clearly erroneous.

Appellant contends that the court's finding of consent was not sufficient to support a conclusion that constitutional rights had not been violated. In our judgment the finding was sufficient.

Affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 313

WALTER SELINGER, PETITIONER

v.

LESTER BIGLER, SPECIAL AGENT OF THE INTERNAL REVENUE SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

This action involves a preindictment motion for the return of property and to suppress evidence (R.I. 1–2).[1] After conflicting testimony was offered at the hearing, the district court made the following findings:

The respondents—Special Agent Bigler and Revenue Agent Landesman—interviewed petitioner at his place of business (R.I. 128). The agents identified themselves and informed him of their official status (R.I. 129). They told petitioner that they wanted to see his business records in furtherance of their investigation of his tax returns. They advised him that he

[1] "R.I." references are to Volume I of the Record in the Court of Appeals, which has been lodged with this Court.

did not have to show them these records or give them any information if he did not wish to (R.I. 129–130). Petitioner, voluntarily and without any threats or promises, agreed to let the agents examine his business records (R.I. 130). Petitioner's accountant thereafter voluntarily turned over other records, which the agents photocopied (R.I. 130). Other records were subsequently voluntarily made available to the agents by petitioner's office manager (R.I. 130–131). From these facts the district court concluded that none of taxpayer's constitutional rights had been violated (R.I. 131), and the Ninth Circuit affirmed this decision *per curiam* (Pet. App. 7–8).

It is uncontested that petitioner was not advised of his right to counsel during the time that the agents interviewed him. There is no merit to taxpayer's contention (Pet. 4–9) that such a warning was required.

All prior appellate decisions are in accord with the decision below. *Kohatsu* v. *United States,* 351 F. 2d 898 (C.A. 9), certiorari denied, 384 U.S. 1011; *Rickey* v. *United States,* 360 F. 2d 32 (C.A. 9), certiorari denied, 385 U.S. 835; *Thomas* v. *United States,* 370 F. 2d 96 (C.A. 5), certiorari denied, 386 U.S. 975;[2] *Morgan* v. *United States* (C.A. 1), decided May 16, 1967 (19 A.F.T.R. 2d [illegible]); *United States* v. *Maius* (C.A. 6), decided June 15, 1967, petition for certiorari

[2] Although this issue is not discussed in the Fifth Circuit's *per curiam* opinion, it is evident from Mr. Justice Douglas' dissent from the denial of certiorari in *Thomas* that the question was raised in the case. Cf. *Evans* v. *United States,* (C.A. 5), decided May 19, 1967.

pending, No. 372, Oct. Term 1967.[3] These decisions are clearly not in conflict with the decision of this Court in *Miranda* v. *Arizona*, 384 U.S. 436, which was directed to "the admissibility of statements obtained from a defendant questioned *while in custody or otherwise deprived of his freedom of action in any significant way.*" *Id.* at 445 (emphasis added). Here, in contrast, the agents questioned taxpayer at his own place of business and in the presence of his wife.[4]

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[3] The case upon which petitioner relies (Pet. 6–8), *United States* v. *Turzynski* (N.D. Ill.), decided June 2, 1967 (20 A.F.T.R. 2d 5004), is an aberrant district court opinion. See *United States* v. *Gleason* (S.D.N.Y.), decided March 14, 1967 (19 A.F.T.R. 2d 1615); *United States* v. *Fiore*, 258 F. Supp. 435, 440 (W.D. Pa.); *United States* v. *Schlinsky*, 261 F. Supp. 265 (Mass.), affirmed, June 6, 1967 (C.A. 1) (19 A.F.T.R. 2d 1597, 1599); *United States* v. *Hill*, 260 F. Supp. 139 (S.D. Calif.); *United States v. Carlson*, 260 F. Supp. 423 (E.D.N.Y.); *Moon* v. *Brennan* (E.D. Wis.), decided November 21, 1966 (19 A.F.T.R. 2d 641); *Stern* v. *Robinson*, 262 F. Supp. 13 (W.D. Tenn.); *United States* v. *Bachman* (W.D. Penn.), decided October 4, 1966 (19 A.F.T.R. 2d 1105); *United States* v. *Neves* (S.D.N.Y.), decided April 28, 1967 (67–1 U.S.T.C. par. 9412).

[4] For similar reasons there is not, as petitioner contends, a conflict with *Escobedo* v. *Illinois*, 378 U.S. 478. As this Court noted in *Miranda*, *Escobedo* referred to "an investigation which had focused on an accused" in the sense of "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." 384 U.S. at 444 & n. 4.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.
MITCHELL ROGOVIN,
Assistant Attorney General.
JOSEPH M. HOWARD,
BURTON BERKLEY,
Attorneys.

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 313

WALTER SELINGER,
Petitioner,

vs.

LESTER BIGLER, Special Agent of the Internal Revenue Service, et al.,
Respondent.

PETITION FOR REHEARING OF ORDER ON PETITION FOR WRIT OF CERTIORARI

DAVID R. FRAZER
Arizona Title Building
Phoenix, Arizona
Attorney for Petitioner

JOHN C. KING and
SHIMMEL, HILL, KLEINDIENST & BISHOP
Arizona Title Building
Phoenix, Arizona
Of Counsel

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The Petitioner prays that this Court rehear the Petitioner's Petition for a Writ of Certiorari and grant a Writ of Certiorari so that the issues presented may be decided by this Court.

On October 16, 1967, this Court denied the Petitioner's Petition for a Writ of Certiorari. On the same date, the Court granted the Petition for a Writ of Certiorari in *Mathis vs. United States,* Supreme Court No. 286 Misc. In *Mathis,* the U. S. Court of Appeals for the Fifth Circuit affirmed the trial court which had admitted into evidence testimony and documents obtained by an agent of the Internal Revenue Service. The

only issue raised on the appeal to the Fifth Circuit was the application of *Miranda vs. Arizona,* 384 U.S. 436 (1966) to a criminal tax fraud case. As stated by the Court of Appeals for the Fifth Circuit:

> "On this appeal, appellant relies solely upon *Miranda v. Arizona,* 1966, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, in urging that the trial court erred in admitting into evidence the testimony and documents obtained at the two interviews because he was not on either occasion warned that he had a right to remain silent, that any statement he made might be used in evidence against him, and that he had a right to the presence of counsel." 376 Fed. 595 at 596.

In affirming the judgment of the District Court, the Fifth Circuit cited *Kohatsu vs. United States,* 351 F.2d 898, (9th Circuit 1965). This is the same decision cited by the Ninth Circuit in ruling against the Petitioner Walter Selinger in the subject dispute. Our case and the *Mathis* case both involved the issue of when the accusatory stage is reached in a criminal tax fraud investigation. At that point in time, as required by *Miranda.* the taxpayer, must be informed of his constitutional rights, including the right to the presence of counsel. Since the Supreme Court has decided to hear arguments on this issue in *Mathis,* it is urged that the Supreme Court also should hear arguments on the same basic issue in the present case.

For the foregoing reason, it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

DAVID R. FRAZER
Attorney for Petitioner

JOHN C. KING and
SHIMMEL, HILL, KLEINDIENST & BISHOP
Of Counsel

I certify that, in connection with preparation of this Petition, that it is presented in good faith and not for delay and that it is restricted to intervening circumstances of substantial effect.

David R. Frazer